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No. 84-312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

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QUESTION PRESENTED

Whether the government violated the First Amendment when it expelled certain charities from the Combined Federal Campaign because they provide health and welfare services by engaging in litigation.

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BRIEF FOR THE RESPONDENTS

The respondents are charities that provide health and welfare services. Although petitioner Devine refers to them as "legal advocacy groups," the respondents do not engage in (and are barred from engaging in) any partisan or political activities. They engage in little or no lobbying. Instead, they engage primarily in litigation and educational activities relating to a variety of civil rights and environmental concerns.

Petitioner did not dispute below—and does not now appear to dispute—that respondents serve health and welfare purposes. He argues only that their choice of *means*

to achieve their purposes justifies their expulsion from the Combined Federal Campaign ("CFC"). The sole issue in this case is whether exclusion on that basis passes constitutional muster.

COUNTER-STATEMENT OF THE CASE

1. Creation of the Combined Federal Campaign

The Combined Federal Campaign was established by President Kennedy in 1961 to regulate what had become a significant source of disruption in federal offices: frequent workplace solicitations by charitable organizations. As petitioner Devine acknowledges, "[p]rior to [1961], charities conducted appeals in a variety of ways in Federal installations around the world." (J.A. 308.) The large number of separate and uncoordinated appeals that occurred each year had created "an increasingly chaotic situation in Federal offices" and "an intolerable administrative burden for Federal officials." (J.A. 71, 103.)

Another concern created by unregulated solicitation prior to 1961 was the appearance of government favoritism toward particular charitable organizations:

> "Voluntary [charitable] agencies . . . did [not] appreciate the fact that some charities seemed to have the support of Federal management, while other charities were allowed, at most, to collect passively by the placement of an unattended contribution jar in an obscure corner of a lunchroom." (J.A. 309.)

Accordingly, President Kennedy established the CFC in 1961 "to limit the number of campaigns and to insure truly voluntary giving by Federal personnel." (J.A. 72, 103.) In place of the multitude of individual appeals then being made, President Kennedy directed that charities be permitted to solicit in the federal workplace "through a single, annual drive combining all participating agencies." (J.A. 309.)

President Kennedy's Executive Order 10,927 described the purpose of the CFC as follows:

> "[to provide] arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations."

The Order spoke of solicitation by charities, not by the government. It made no mention of "traditional" charities, nor did it suggest that government officials would decide which charities were deserving of employee contributions. Rather, it focused entirely on procedural regularization of the solicitation process.[1]

In 1963, the Civil Service Commission implemented Executive Order 10,927 by promulgating the Manual on Fund-Raising Within the Federal Service (the "Manual"). The Manual specified that the CFC would be open to "nonprofit, tax-exempt agencies having specific functions in the fields of health, welfare or recreational services, or in the provision of international services . . . ." The only program requirements imposed by the Manual were the following:

> "An active and necessary program with particular regard to the welfare of the public and the persons served; evidence of consultation and cooperation with established agencies in the same or related fields; and efficient operations."[2]

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[1] E.O. 10,927 (March 18, 1961), *reprinted in* Respondents' Appendix ("Resp. App.") at 1a-2a.

[2] Manual on Fund-Raising Within the Federal Service §§ 5.21, 5.31 (Feb. 1973 ed.). This 1973 edition of the Manual was a reprint of the original 1963 version. *See id.* at iii. Counsel for respondents have lodged a copy of this edition with the Clerk of the Court.

Petitioner has lodged with the Court the *1977* edition of the Manual, containing amendments through September 5, 1980. The

Like the Executive Order, the Manual contained no suggestion that participation would be confined only to "traditional" or "noncontroversial" charities. Nor did the Manual indicate in any way that organizations that discharge their charitable functions by litigating on behalf of others were considered "inappropriate" charities.[3]

2. Solicitation in the Federal Workplace Through the CFC

The stated purpose of the CFC under President Reagan's Executive Order 12,404 (as well as under its predecessors) is to provide a means for charities "to solicit contributions from Federal employees . . . at their places of employment." (Resp. App. 6a.) Since 1961, the CFC has been "the *exclusive* vehicle for on-the-job charitable solicitation" of federal employees.[4] A charity denied participation in the CFC may not solicit contributions in the federal workplace by any other means.[5] Nor, under the regulatory scheme at issue here, may federal

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requirement in that edition that CFC participants provide "direct services to persons in the fields of health and welfare" (§ 5.21)—on which petitioner relies so heavily here—was not contained in the 1963 Manual; it was added some time after the 1973 reprint.

[3] As the district court found, "plaintiffs do fall within the limits of [the CFC] as it historically has existed. Executive Order 10927 made no differentiation among charitable organizations on the basis of how they accomplish their objectives." Pet. App. 90a.

[4] *National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 174-75 (D.C. Cir. 1981) (emphasis added). *See* Pet. App. 2a; Pet. Br. 3-4, 25.

[5] The United Black Fund of America and others incorrectly assert in their *amicus* brief that organizations excluded by the CFC "may nonetheless directly appeal in the workplace to federal employees for contributions to their respective organizations." Br. at 6; *see id.* at 15. In reality, the regulations provide only that limited arrangements may be made for *off-the-job* solicitations on military institutions and at *entrances* to Federal buildings ("for example, the use of 'poppies' or other similar tokens by veterans organizations"). 5 C.F.R. § 950.311 (1984).

employees designate nonparticipating charities as recipients of their contributions.

The CFC solicitation does not take the form of physical entry into the workplace by representatives of the participating charities. Instead, a brochure describing the participants has been distributed to virtually all federal civilian and military employees. The brochure has included a specific appeal from each participating charity, in the form of a 30-word statement identifying itself and describing its activities. *See* 5 C.F.R. § 950.521(e)(2)(i) (1984). The charities themselves—not government officials—have prepared the 30-word statements.[6] We have included in Respondents' Appendix two examples of CFC brochures: one involving many participants and the other involving relatively few (Washington, D.C. and Honolulu, Hawaii). (Resp. App. 59a-66a.)

Under the regulatory scheme at issue here, participation in the Campaign historically has involved a two-step annual application process. *First*, an organization that wishes to participate has had to apply to the Office of Personnel Management ("OPM") for certification of its national eligibility. *See* 5 C.F.R. § 950.407 (1984).[7]

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[6] Although petitioner states that government officials may edit a participant's statement "if it does not conform to the regulatory requirements," he concedes that, in reality, the 30-word statements routinely are published in the form submitted by the participating charity. *See* Pet. Br. 27 & n.21. Contrary to petitioner's suggestion that the CFC is conducted "largely at government expense" (Pet. Br. 3), all direct costs of the Campaign (including preparation of the brochure and other promotional materials) are borne by the participating charities. 5 C.F.R. § 950.521(a) (1984). Petitioner introduced no evidence as to the indirect cost to the government of the time devoted by its employees to the CFC.

[7] This entails, among other things, a showing that the entity is "organized on a national scale," has earned "goodwill and acceptability throughout the United States," and has "national scope" based on its provision of services, the sources of contribution support, and the national character of its campaign. 5 C.F.R. § 950.403(c) (1984). The new CFC regulations adopted after the

Second, an organization deemed nationally eligible by OPM has had to apply separately to each of the 550 local Campaigns in which it wishes to participate. *Id.* § 950.211(h).

3. Designated Versus Undesignated Contributions

Historically, federal employees have contributed to the CFC in either of two ways. The employee may make a *designated* contribution, specifying which CFC participant shall receive the funds.[8] Alternatively, the employee may make an *undesignated* contribution, which the organization responsible for administering the local Campaign (the "Principal Combined Fund Organization" or "PCFO") may distribute to participating organizations that it deems appropriate. *Id.* § 905.509(g), .513(a).

The respondents and other legal defense funds receive only those CFC contributions that are specifically designated to go to them; they do not participate in the distribution of undesignated contributions.[9] Therefore, federal employees who do not want their contributions to aid a legal defense fund either may designate their contributions to go to groups they prefer or may make undesignated contributions.[10]

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decision below, 49 Fed. Reg. 32,735-53 (1984), eliminate the national eligibility process.

[8] In recent years, the CFC has encouraged federal workers to make designated contributions. *See* 5 C.F.R. § 950.513(a) (1984); J.A. 84-87.

[9] *See* Pet. App. 12a-13a, 31a, 89a, 95a; Pet. Br. 12 n.12. The distribution of undesignated funds is not at issue in this case. *See generally NAACP Legal Defense & Educ. Fund, Inc.* v. *Devine*, 560 F. Supp. 667 (D.D.C. 1983).

[10] Petitioner Devine has explained that this designation option has enabled employees opposed to the activities of particular charities to ensure that none of their contributions would go to such groups: "Most workers still contributed to the [Fall 1982] campaign, but earmarked their donations for specific charities, thereby

Thus, if the decision below is affirmed, legal defense funds that participate in the CFC will continue to receive only those contributions that are specifically designated to go to them by contributing federal employees.

4. Participation in the CFC by Legal Defense Funds

In 1980, three organizations applied to the CFC that had not previously participated in it: the NAACP Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund (both respondents here), and the NAACP Special Contribution Fund. The Special Contribution Fund was allowed to participate in the Campaign (as were legal aid societies). The other two organizations were excluded for the stated reason that, "while otherwise qualified, [they] do not provide 'direct services,' but rather serve as advocates for groups."[11]

The two excluded organizations brought suit challenging their exclusion and were ordered admitted to the Campaign. *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981) (*"NAACP-LDF I"*). The district court concluded that "the government must meet First Amendment strictures

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avoiding the possibility that their gifts would go to unwanted recipients." J.A. 21.

[11] The government's avowed basis for admitting the Special Contribution Fund, while excluding the other two groups, was that the latter two spent more than 50 percent of their budgets on litigation, while the Special Contribution Fund spent only 25 percent of its budget on such activity. *See NAACP Legal Defense & Educ. Fund, Inc. v. Campbell*, 504 F. Supp. 1365, 1366, 1367-68 n.3 (D.D.C. 1981). Testimony of NAACP officials in 1979, however, made clear that much of the Special Contribution Fund's resources are expended on litigation in opposition to segregation and employment discrimination. *See Combined Federal Campaign: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office & Civil Service*, 96th Cong., 1st Sess. 384-86 (1979) (statement of Theodore M. Berry, General Counsel, NAACP) [hereinafter cited as *"1979 Hearings"*].

in its regulations concerning access to this channel of communication [the CFC], which is, in fact, the only channel by which organizations can appeal to government employees at their workplace." *Id.* at 1367. The court held that the "direct services" requirement imposed by the Manual on Fund-Raising was unconstitutionally vague and was inconsistent with Executive Order 10,927. *Id.* at 1367-68. The government did not appeal the district court's order directing the plaintiffs' admission to the Campaign.

Following the district court's decision in *NAACP-LDF I*, several legal defense funds (among them, five of the present respondents) applied for admission to the 1982 Campaign (*i.e.*, the charity drive occurring in the Fall of 1981). (J.A. 347.) Petitioner Devine stated that he did not have time to bring the 1982 Campaign into conformity with the district court's order by developing more precise eligibility standards, and he accordingly admitted several of these organizations. (J.A. 56.) They thereafter applied, and were admitted, to a large number of local Campaigns.

Participation by legal defense funds did not harm the 1982 Campaign. On the contrary, 1982 was a record year. Overall contributions rose by almost nine percent. The rate of participation among federal workers also increased by nine percent. (J.A. 430.)

Despite the unprecedented success of the 1982 Campaign, petitioner Devine mounted his own campaign to persuade the President to expel legal defense funds from the CFC. In a memorandum to the Office of Management and Budget, petitioner proposed issuance of a new Executive Order expelling legal defense funds, on the theory that their activities "clearly conflict with the thrust of the President's budget decisions." (J.A. 71-82.)

The President rejected petitioner Devine's proposal. On March 23, 1982, President Reagan issued Executive

Order 12,353, which defined eligibility for participation in the CFC in the same terms as had President Kennedy's Executive Order: "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate." [12]

Petitioner Devine implemented this Executive Order by issuing new CFC regulations that expressly permitted participation by legal defense funds.[13] The Office of Personnel Management issued a press release on July 2, 1982 praising the new regulations (in petitioner Devine's words) for " 'offer[ing] Federal employees a wide choice of charities to select, and . . . encourag[ing] them to make their contributions in a very personal way, by carefully selecting the individual charities they'd like to benefit.' " Petitioner Devine explained that the regulations had been tailored to remove doubts as to "the eligibility of legal defense, minority and women's organizations," because " 'OPM is persuaded that some of the earlier [eligibility] criteria were overly restrictive . . . .' " (J.A. 84-87.)

The Administration's decision in 1982 to allow legal defense funds to remain in the Campaign was voluntary. The government could have complied with the ruling in *NAACP-LDF I* by issuing a more precise "direct services" requirement. Instead, President Reagan considered petitioner Devine's request for exclusion and rejected it.

5. Expulsion of Legal Defense Funds from the Campaign

In 1982, several legal defense funds in addition to those that had participated in the 1982 Campaign (including the remaining respondents here) applied for entry into the 1983 Campaign. One of the new applicants

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[12] Executive Order 12,353, § 1 (March 23, 1982), *reprinted in* Resp. App. 3a-5a.

[13] 5 C.F.R. § 950.101(a)(3)(vii) (1983), *reprinted in* Resp. App. 9a.

was the National Right to Work Legal Defense Foundation, which engages in litigation opposed to compulsory membership in labor unions. Various federal employees and labor unions wrote letters to OPM expressing hostility to the legal defense funds generally and, in particular, to the Right to Work Foundation. (J.A. 358, 365, 378.) Although a few labor unions threatened to boycott the CFC because of the Right to Work Foundation's participation, the AFL-CIO forbade its constituent groups to boycott the Campaign. Instead, it urged "all federal and postal employees to designate the agency or agencies that meet their definition of a true charity." (J.A. 91-94.)

Notwithstanding the flurry occasioned by the Right to Work Foundation's participation, the 1983 Campaign—which included more legal defense funds and more charities of other types than any prior Campaign—set a new record for charitable contributions. Total contributions increased by seven percent over 1982, and the rate of employee participation rose by three percentage points.[14] The most significant change occurred in the number of employees who designated their contributions to go to specific groups: the volume of such contributions as a percentage of the total rose by one-fourth in 1983, to 63 percent. (J.A. 430.)

The record also demonstrates that, when given the opportunity, federal employees have made substantial designated contributions to legal defense funds. During the 1982 and 1983 Campaigns, the NAACP Legal Defense and Educational Fund, for example, received over $525,000 in contributions from thousands of federal workers in over 130 localities. (J.A. 228, 234-35.) In 1983 alone, legal defense funds received $350,000 just in the National Capital Area CFC, and an estimated $2 million nationwide. (J.A. 51-52.)

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[14] *See* CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 55a-57a.

Despite the success of the 1982 and 1983 Campaigns, petitioner Devine renewed his effort to expel legal defense funds from the CFC. In a February 2, 1983 memorandum to the White House, petitioner again proposed a new Executive Order that would accomplish his objective. He emphasized the "problems" allegedly caused by the participation of "aggressive and controversial political and legal advocacy groups"—in particular, the Right to Work Foundation. He singled out respondents NAACP Legal Defense and Educational Fund and Sierra Club Legal Defense Fund as examples of organizations that would be expelled by the proposed Executive Order. (J.A. 102-10.)[15]

Petitioner Devine's persistence finally yielded results. On February 10, 1983, President Reagan issued Executive Order 12,404. Section 1(b) of the Order effectively expelled all legal defense funds from the CFC by declaring ineligible for participation any organizations that "seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or *litigation on behalf of parties other than themselves.*"[16] Organizations that provide "legal aid services" to needy individuals, on the other hand, were made eligible to participate in the CFC.[17]

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[15] In subsequent Congressional testimony, petitioner acknowledged that "really just one or two or three groups have caused most of the controversy in the Campaign." Again, he singled out union opposition to the Right to Work Foundation. *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations (Part I)*, 98th Cong., 1st Sess. 177 (1983) (testimony of Donald Devine) [hereinafter cited as *"1983 Hearing"*].

[16] E.O. 12,404, § 1(b) (Feb. 10, 1983), *reprinted in* Resp. App. 7a (emphasis added).

[17] The regulations issued to implement Executive Order 12,404 provide that eligible "voluntary charitable health and welfare agenc[ies]" include, *inter alia*, organizations providing "[l]egal

In a press release announcing the new Executive Order, the Office of Personnel Management explained the Administration's action as follows:

> "Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to the recent past inclusion of advocacy groups in the CFC. . . . Devine added, 'We asked the Federal workers to stay with the campaign and to give us one year to clean it up. They kept their part of the bargain, and now President Reagan has fulfilled our promise.'" (J.A. 21.)

6. The Litigation Below

Following the promulgation of Executive Order 12,404, the respondents filed suit alleging that their expulsion from the CFC violated their First Amendment right to engage in charitable solicitation. In the district court, petitioner Devine argued that expulsion of legal defense funds was necessary in order to avoid the "controversy" that he contended had surrounded their participation in the 1982 and 1983 Campaigns.[18] The district court concluded, however, that petitioner's proffered justification was impermissible under the First Amendment. (Pet. App. 93a.) The government did not seek a stay of the district court's order, and the respondents thereafter participated in the 1984 Campaign.[19]

In the court of appeals, petitioner Devine downplayed the "controversy" justification. Instead, he argued that the CFC constitutes a government "subsidy" that he may dispense as he sees fit, free of First Amendment scrutiny.[20] The majority in the court of appeals rejected the "subsidy" rationale. (Pet. App. 14a-17a.) Even the dissenting judge declined to accept the "subsidy" justification. (*Id.* at 45a n.1.) The court of appeals affirmed the district court's judgment directing inclusion of the respondents in the Campaign. A divided court denied rehearing *en banc*. (*Id.* at 80a-81a.) The present petition for certiorari followed.[21]

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aid services . . . to needy, poor, and indigent individuals solely because of their inability to afford legal counsel and without a policy or practice of discrimination for or against the kind of cause, claim, or defense of the individual." 5 C.F.R. § 950.101(a)(1)(i)(H) (1984). Respondents contended in the district court that admitting legal aid organizations, while excluding legal defense funds, violated the equal protection clause. The district court did not reach the equal protection issue. It held that exclusion of legal defense funds from the receipt of designated contributions violated the First Amendment, and that their exclusion from the receipt of undesignated funds was raised prematurely in that final regulations had not yet been issued. Pet. App. 95a.

[18] Petitioner emphasized the "overwhelming public outcry against continued inclusion" of legal defense funds and maintained that Executive Order 12,404 was a "response to these concerns and threats." *See* J.A. 345; Defendant's Motion to Dismiss 12 (April 12, 1983); Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 13-18, 46-47 (May 24, 1983).

[19] As we demonstrate below, the 1984 Campaign (held in the Fall of 1983) set a new record for total contributions. *See* page 34 *infra*.

[20] *See* Brief for Appellant 24-39 (Sept. 1983).

[21] On August 16, 1984, after the court of appeals entered its order affirming the district court, petitioner Devine promulgated a new set of CFC regulations. 49 Fed. Reg. 32,735-53 (1984) (to be codified at 5 C.F.R. Part 950). The most significant of the changes effected by the new regulations was the elimination of the national eligibility process. The new regulations allow federal employees to specify as the recipient of their contributions any health and welfare entity that qualifies for tax exemption under Section 501(c)(3) of the Internal Revenue Code. *See id.* at 32,744 (to be codified at § 950.211(h)). As before, undesignated contributions are to be turned over to the local Principal Combined Fund Organization for distribution to local charities. *Id.* at 32,736, 32,743, 32,749-50 (to be codified at § 950.509(g), .513(a), .521(e)(1)(iv)). The new regulations also eliminate the CFC leaflet containing each participating organization's 30-word statement. In its place, local Campaigns may elect to distribute a list of charities that previously have participated in the CFC, and participating organizations may provide their own informational brochures for limited distribution to federal workers. *Id.* at 32,750 (to be codified at § 950.521(b)).

SUMMARY OF ARGUMENT

The respondents are long-established, well-known legal defense funds that serve health and welfare objectives, in large part by means of litigation in the courts. They do not seek special status or favor before the government or in the Combined Federal Campaign. They seek only the same opportunity to solicit contributions as is accorded charitable organizations that serve similar purposes by means other than litigation. The respondents do not demand the right to maintain a physical presence in the federal workplace, or even to distribute their own fundraising materials, but merely to have their 30-word appeals included in the brochure circulated to federal employees through the CFC. The respondents ask only that federal employees who wish to support them be allowed to do so by designating them as the beneficiaries of their CFC contributions.

This case does not involve a choice among charitable objectives. Both courts below correctly concluded—and petitioner has never disputed—that the legal defense funds expelled from the CFC provide health and welfare services to human beings, just as do the so-called "traditional" charities admitted to the CFC by petitioner Devine. The sole difference is that the respondents perform their services primarily by exercising their constitutionally protected right to engage in litigation, rather than by other means (including litigation by legal aid societies, which petitioner deems acceptable). In *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), this Court held that charities may not be denied the right to solicit contributions on the basis of how they spend the money they receive. Nor may adverse government action be based upon the fact that respondents vindicate their clients' legal rights by recourse to the courts. *See NAACP* v. *Button*, 371 U.S. 415 (1963). No matter how the applicable legal test is formulated, petitioner Devine's ongoing effort to purge the CFC of legal defense funds cannot be sustained.

We establish initially that restrictions upon participation in the CFC are subject to First Amendment scrutiny. This Court long has recognized that the First Amendment protects the right of charitable solicitation. Petitioner Devine's attempt to evade constitutional scrutiny by asserting that "the amount of expressive activity by charities involved in the Campaign has always been quite minimal" and that the "First Amendment interests of groups that wish to participate are decidedly weak" (Pet. Br. 26, 28) must fail on the record in this case.

We next demonstrate that expulsion of legal defense funds from the CFC violates the First Amendment, regardless of what type of forum the CFC is deemed to be. Participation in the Campaign by legal defense funds plainly is compatible both with the purposes of the CFC and with the government's legitimate interest in maintaining the federal workplace for its intended purposes. The courts below correctly found nothing in the record to support petitioner's concern that participation by respondents in the CFC would cause any disruption of either the Campaign or the workplace.

Petitioner Devine's assertion that the basic purpose of the CFC is to enable the government to direct employees' contributions to "traditional" charities, whose goals he deems more "worthwhile" than those of legal defense funds, distorts the basic function of the Campaign. The CFC historically has served as a "clearinghouse" or "publicity and collection agent." The use of "traditionality" as the litmus test for eligibility never has appeared in the Executive Orders or implementing regulations. Moreover, historically it has been the individual contributor, not the government, who has decided which charities are "worthy" of his contribution. Some federal employees prefer to help the needy by facilitating their access to

the judicial system rather than by other forms of assistance, or to promote public health by seeking enforcement of pollution laws that prevent illness rather than treatment to cure it. These employees should be free to designate their contributions accordingly.

Petitioner Devine's specific objections to participation by legal defense funds are devoid of any factual support in the record. *First*, petitioner's concern that legal defense funds sparked "controversy" among some federal employees concededly involves only "one or two" participants—none of them respondents here. Moreover, the record amply demonstrates that even such "controversy" had no discernible impact on the federal workplace or the success of the CFC. In any event, this Court consistently has held that the government may not silence a speaker because others in the audience might find his views objectionable. The First Amendment does not permit government officials to decide whose message is too "controversial" to be afforded access to a government-controlled medium of expression.

Second, petitioner Devine's ostensible wish to maintain the appearance of "neutrality" among competing charities does not justify the expulsion of legal defense funds. It is individual federal workers, not the government itself, who contribute to these organizations and should be able freely to choose among them. A simple disclaimer in the CFC brochure would satisfy petitioner's professed concern.

Third, petitioner Devine's apprehension that the CFC would be "inundated" by legal defense funds is illusory. By his own admission, the Executive Order would have excluded only a handful of such groups. Contrary to petitioner's present assertion, the courts below did *not* require the admission to the Campaign of all entities entitled to claim the charitable exemption provided by Section 501(c)(3) of the Internal Revenue Code.

Finally, petitioner Devine's assertion that alternative fundraising channels are available to legal defense funds misses the mark. The CFC is a particularly efficient, effective means of reaching federal employees. If the respondents are expelled from the CFC, they will be forbidden to solicit contributions in the federal workplace, for only through the CFC is such solicitation permitted. The alternatives proposed by petitioner are palpably deficient. They do not constitute reasonable substitutes for the right to participate in the Campaign.

ARGUMENT

THE EXPULSION OF LEGAL DEFENSE FUNDS FROM THE CFC VIOLATES THE FIRST AMENDMENT

A. The First Amendment Protects the Right of Charitable Solicitation

In numerous decisions, this Court has held that charitable solicitation is an activity protected by the First Amendment.[22] For example, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), Justice White wrote for the Court:

> "Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solici-

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[22] *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2849 (1984); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Breard* v. *Alexandria*, 341 U.S. 622, 641-42 (1951); *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943); *Largent* v. *Texas*, 318 U.S. 418, 422 (1943); *Jamison* v. *Texas*, 318 U.S. 413, 414 (1943); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-05 (1940); *Schneider* v. *State*, 308 U.S. 147, 161 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938).

> tation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."

Id. at 632.[23]

Petitioner seeks to distinguish participation in the CFC from charitable solicitation protected by the First Amendment. He asserts that "the amount of expressive activity by charities involved in the Campaign has always been quite minimal" and that the "First Amendment interests of groups that wish to participate are decidedly weak." (Pet. Br. 26, 28.) Petitioner does not, however, deny that the 30-word appeal in the CFC brochure—or the mere listing of a participant's name—constitutes a protected form of expression. Moreover, petitioner ignores this Court's holding in *Schaumburg* that, apart from the communication that accompanies charitable solicitation, the solicitation itself is protected because of "the reality that without solicitation the flow of such information and advocacy would likely cease." 444 U.S. at 632.[24]

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[23] In dealing with restrictions upon participation in the CFC, the lower courts consistently have recognized that such participation constitutes charitable solicitation protected by the First Amendment. *See, e.g.*, Pet. App. 14a; *id.* at 88a-89a; *National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 178 (D.C. Cir. 1981); *NAACP Legal Defense & Educ. Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1366-67 (D.D.C. 1981).

[24] In the court of appeals, petitioner Devine contended that this is not a First Amendment case, but a "government subsidy" case—in effect, that the CFC is largess that the Administration may dispense or withhold as it pleases. *See* Brief for Appellant 24-39 (Sept. 1983) (relying upon *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983)). In this Court, petitioner appears to have abandoned the "subsidy" rationale.

In any event, the evidentiary record belies any claim that the CFC was established as a government "subsidy" program or—prior to petitioner Devine's arrival—operated as one. Both of the courts below found to the contrary. *See* Pet. App. 15a, 93a-94a. *Cf. 1979 Hearings* at 31 (statement of Alan K. Campbell, Director, OPM) ("Remember, we are talking about Federal employees' money now, not tax money."). Moreover, the court of appeals correctly held that the presence of an incidental element of subsidization would not relieve petitioner of First Amendment constraints. Pet. App. 16a-17a. That conclusion is compelled by this Court's recent decision in *F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106, 3128 (1984) (rejecting subsidization argument as basis for restrictions on First Amendment activity). *See generally Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157-58 (1946).

B. The Judgment Below Should Be Affirmed Irrespective of Whether the CFC Is a Limited Public Forum or a Nonpublic Forum

In establishing an annual campaign during which participating charities are permitted to solicit contributions from federal employees in the workplace, the government has created a forum for the exercise of charities' First Amendment right to solicit contributions. Petitioner Devine argues that, for purposes of First Amendment analysis, the forum is the federal workplace, rather than the CFC. (Pet. Br. 23.) As this Court has recognized, however, it is the particular channel of communication—*i.e.*, the designated medium of expression—that constitutes the forum for First Amendment purposes. *See, e.g.*, *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 44 (1983) (interschool mail system and teacher mailboxes, rather than school buildings); *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (mailbox approved for deposit of mails by the Postal Service).

In this case, the forum plainly is the CFC. Permitted expression takes place exclusively within the designated medium of Campaign expression: the brochure setting forth the charities' 30-word statements. Respondents assert no right to enter into the federal workplace or to

engage in any form of expressive activity other than that permitted to Campaign participants—namely, the submission of their 30-word statements for inclusion in the brochure. Inclusion of their statements in a brochure that already contains like statements on behalf of similarly situated charities involves none of the incompatibility between expression and forum that formed the basis of the decisions cited by petitioner.[25]

Whether the forum is the CFC, as respondents suggest, or the federal workplace, as petitioner argues, all parties are in agreement that the forum is not a traditional public forum, like a street or park, "which by long tradition or by government fiat [has] been devoted to assembly and debate." *Perry Education Association*, 460 U.S. at 45. Rather, the forum is a limited public forum, designated by the President since 1961 as the exclusive opportunity for health and welfare charities to solicit federal employees in the workplace for charitable contributions.[26] The district court so held (Pet. App. 89a-

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[25] *Cf. Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (entry sought into prison for purpose of conducting labor union meetings); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (entry sought into jail for purpose of conducting protest); *Greer* v. *Spock*, 424 U.S. 828 (1976) (entry sought into military base for purpose of engaging in partisan political speech and distributing leaflets).

[26] Although the government was not required to establish the CFC or otherwise to open up the federal workplace for charitable solicitation (and while the President arguably could terminate the CFC altogether), so long as the CFC is conducted, the government "is bound by the same standards as apply in a traditional public forum." *Perry Education Association*, 460 U.S. at 46. Any content-based exclusion of health and welfare charities from the CFC must serve a compelling government interest and be narrowly drawn to achieve that end. *Id.* at 45. Any time, place, and manner restrictions must be content-neutral, be narrowly drawn to serve a significant government interest, and leave open "ample" alternative channels of communication. *Id. See also Regan* v. *Time,*

91a), as has every other court that has considered the issue.[27]

The court of appeals assumed, without deciding, that the CFC was a nonpublic forum, because it concluded that petitioner Devine's effort to expel legal defense funds from the Campaign failed to satisfy even the "reasonableness" test applicable to exclusion from a nonpublic forum. Thus, it was unnecessary for the court of appeals to reach the question whether expulsion of legal defense funds comports with the more exacting standards governing restrictions upon access to a limited public forum.

Respondents will demonstrate below that petitioner's expulsion of legal defense funds from the CFC does not satisfy even the "reasonableness" test applicable to exclusion from a nonpublic forum. *A fortiori*, the expulsion does not serve any compelling governmental interest, as is required to sustain exclusion from a limited public forum. Accordingly, while respondents believe that the district court was correct in finding that the CFC is a limited public forum, this Court (like the court of appeals) can answer the question presented without reaching the issue whether the CFC is a limited public forum or a nonpublic forum.

Inc., 104 S. Ct. 3262, 3266-67 (1984); *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984).

The government seeks to evade these standards by arguing that its policy of "selective access" among charitable organizations renders the CFC—which exists only as a channel for expressive activity—a nonpublic forum. *See* Pet. Br. 26. Were this true, the government could transform any limited public forum into a "nonpublic" one simply by gerrymandering the standards of access to exclude the groups it disfavors. The government would never need to show that its content-based exclusions were narrowly drawn to serve a compelling government interest; instead, it would only have to recite that the groups excluded were not "designated" for "selective access."

[27] *See National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 178 (D.C. Cir. 1981); *NAACP-LDF I*, 504 F. Supp. at 1367; *Na-*

C. To Survive First Amendment Scrutiny, the Denial of Access to a Nonpublic Forum Must Be Reasonable

Even when government property constitutes a nonpublic forum, the government may not exclude particular groups at will. The denial of access will be upheld only if it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association*, 460 U.S. at 46.[28]

The crucial inquiry is whether the activity excluded from a nonpublic forum is fundamentally incompatible with the government property in question. In *Perry*, the State was permitted to regulate access to government property in order to "limi[t] a nonpublic forum to activities compatible with the intended purpose of the property." 460 U.S. at 49. *See id.* at 55 ("the State may draw distinctions which relate to the special purpose for which the property is used"). Similarly, in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 435 U.S. 114 (1981), the Court upheld the denial of access to letterboxes for the distribution of leaflets because "appellees' First Amendment activities are *wholly incompatible* with the maintenance of a nationwide system for the safe and efficient delivery of mail." *Id.* at 130 n.6 (emphasis added). As Justice Powell explained in his concurring opinion in *Greer* v. *Spock*, 424 U.S. 828 (1976):

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tional Black United Fund, Inc. v. *Campbell*, 494 F. Supp. 748, 755-56 (D.D.C. 1980), *rev'd on other grounds*, 667 F.2d 173 (D.C. Cir. 1981). Although these decisions did not use the precise words "limited public forum," they described the CFC in equivalent terms.

[28] The Court articulated the "reasonableness" requirement in numerous decisions that preceded *Perry*. *See, e.g., United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977); *Lehman* v. *City of Shaker Heights*, 418 U.S. 300, 303-04 (1974) (plurality opinion). *Cf. id.* at 304 (access restriction "must not be arbitrary, capricious or invidious").

> "[I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a 'public forum,' or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. . . . *Some basic incompatibility must be discerned between the communication and the primary activity of an area.*"

Id. at 843 (emphasis added; citation omitted).

The Court's decisions make clear that exclusion of particular groups requires more than just some difference from the included groups. There must be a basic conflict between the activities of the excluded groups and the activities normally conducted on the government property.

Petitioner seems to suggest that "deference" to public officials' judgments of what is best for their agencies requires uncritical acceptance of any claims of incompatibility. (Pet. Br. 46.) But the "reasonableness" test is deferential, not toothless. In the nonpublic forum cases, this Court regularly has reviewed the government's reasons for denial of access to assess their merit.[29] The Court has not blindly accepted unsupported government assertions of a supposed need to exclude expressive activity.[30]

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[29] *See, e.g., Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 127 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974).

[30] In some of the nonpublic forum cases, the parties seeking access did not deny that the government restrictions at issue were reasonable. Instead, they argued that the restrictions failed to satisfy the strict scrutiny that would have applied had the property constituted a public forum. In those cases, therefore, the Court did not need to examine closely the reasonableness of the restrictions, once it concluded that the property was a nonpublic forum. *See, e.g., Lehman* v. *City of Shaker Heights*, 418 U.S. 300, 303-04 (1974) (plurality opinion).

Contrary to petitioner Devine's assertion, this Court has *not* treated the reasonableness test as though it were fungible with the "rational basis" test applied in equal protection cases. (*See* Pet. Br. 45-46.) Under the latter test, the Court will uphold government action if it can conceive of a hypothetical rationale that would justify the action; the Court will not independently assess the validity of the factual predicates for the government's decision.[31] That approach differs from the reasonableness test, which involves independent judicial scrutiny of the evidentiary (as opposed to hypothetical) support for the government's exclusionary actions. Petitioner concedes here that the Court's use of the rational basis test in nonpublic forum cases has occurred "in the context of discussions of equal protection challenges to the access restrictions at issue." (Pet. Br. 46 n.37.) By contrast, the First Amendment discussions in those cases applied the reasonableness test. *See Perry Education Association*, 460 U.S. at 49-50; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 128-30.[32]

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[31] *See, e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 547-48 (1983); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-64 (1981); *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969).

[32] Especially probing review of a denial of access is appropriate when the government's justification for that denial has shifted repeatedly. Such vacillation suggests that the ostensible justifications are post hoc rationalizations. *See, e.g., Securities Indus. Ass'n* v. *Board of Governors of the Federal Reserve Sys.*, 104 S. Ct. 2979, 2983 (1984). In this case, the basis for petitioner Devine's initial, unsuccessful effort to expel legal defense funds was their incompatibility, not with the CFC, but with the President's budgetary priorities. The following year, the avowed impetus for Executive Order 12,404 was the desire to avoid "controversy" in the Campaign, and it was on that ground that the government defended the exclusion in the district court. In the court of appeals, the justification shifted to the government's professed wish to avoid "subsidizing" legal defense funds. *See* pages 8, 11-13, *supra*. In this Court, petitioner has shifted once again, now emphasizing the government's asserted right to direct contributions to so-called

Petitioner Devine's exclusionary action does not satisfy the reasonableness standard. Participation in the CFC by legal defense funds is entirely consonant with the functions of the federal workplace and with those of the Campaign itself. The attempted restriction of participation to so-called "traditional" charities represents an attempt to prevent federal workers from deciding which charities they wish to support through the CFC, imposing upon them instead petitioner's perception of "worthwhile" charities.

D. Participation by Legal Defense Funds Is Not Incompatible with the Forum

The essence of the reasonableness test, in Justice Powell's words, is whether there is "[s]ome basic incompatibility . . . between the communication and the primary activity of an area." *Greer* v. *Spock*, 424 U.S. at 843 (concurring opinion). Whether the forum here is viewed as the federal workplace or as the CFC itself, participation by legal defense funds is demonstrably compatible with it.

1. *Compatibility with the Federal Workplace*

Petitioner Devine insists that "[i]t is the workplace, and not the Campaign," that constitutes the relevant forum. (Pet. Br. 23-24 n.18.) Even if he is correct (contrary to the findings of both courts below), the focus of inquiry remains whether charitable solicitation by legal defense funds in the manner permitted by the CFC somehow is incompatible with the federal workplace. Petitioner cannot contend that charitable solicitation itself is incompatible with the federal workplace, for the purpose of the Campaign is to allow such solicitation. Instead, petitioner suggests that "expansion of the Cam-

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"traditional" charities. *See* Pet. Br. 29-34. In these circumstances, as the court below observed, a reviewing court must "be circumspect in evaluating conclusory statements by Government officials which do not comport with either the evidence in the record or common sense." Pet. App. 23a.

paign beyond its traditional scope tends to create morale problems and to divert some federal employees from their normal duties." (*Id.* at 39 n.31.)

Petitioner Devine points to no evidentiary support for this conclusory assertion. The court of appeals found no record evidence "to support the suggestion that work was disrupted when LDFs participated in the CFC in 1981 and 1982 . . . ." (Pet. App. 32a n.16.) Absent any evidence that participation by legal defense funds had caused disruption of the workplace or would do so in the future, the court below was "unwilling to defer to the fanciful—and somewhat specious—speculations offered by the appellant." (*Id.* at 32a (footnote omitted).)[33]

2. *Compatibility with the Purposes of the CFC*

Petitioner Devine's incompatibility argument focuses primarily upon the Campaign as the relevant forum. According to petitioner, the CFC is not a mere "clearinghouse" or "publicity and collection agent" for federal workers' contributions. Rather, it is a platform for the government to "determin[e] the focus of the charitable drive it sponsors," and an opportunity to direct employee contributions to "traditional charities" whose "goals" are deemed more "worthwhile" than those of legal defense funds. (Pet. Br. 32, 34-35, 48 n.39.)[34]

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[33] Petitioner asserts that the controversy caused by participation of legal defense funds necessitated "investments of extraordinary time and effort by those involved in the Campaign." Pet. Br. 39. The court of appeals correctly characterized this concern as "merely a post hoc rationalization for the exclusion of LDFs." Pet. App. 34a n.17. Moreover, petitioner has pointed to no evidence indicating that such "extraordinary" efforts interfered with the regular conduct of federal business. *See id.* Similarly, petitioner's assertion that "expansion of the Campaign beyond its traditional scope tends to create morale problems," Pet. Br. 39 n.31, is unsupported by the record. *See* Pet. App. 32a & n.16.

[34] The category of "traditional" charities, which figures so prominently in petitioner's brief, is nowhere mentioned in the Executive Order or implementing regulations. In fact, nothing in the history of the Campaign has attempted to define eligibility in terms of whether a charity is "traditional" or "nontraditional."

Petitioner's declaration that legal defense funds are less "worthwhile" than "traditional" health and welfare charities is both inaccurate and an improper basis for exclusion. *First*, the record in this case is replete with evidence that the respondents *do* provide health and welfare services; their litigation efforts have resulted in direct, tangible benefits to people all over the United States.[35] Petitioner never has disputed any of this record evidence. Unlike the "traditional" charities favored by petitioner, however, the respondents pursue their objectives by exercising the constitutional right to obtain judicial assistance in enforcing the laws that protect their clients. *See NAACP* v. *Button*, 371 U.S. 415, 429-31 (1963) ("[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."). The Constitution does not permit petitioner to discriminate against the respondents because they exercise this right.

Second, petitioner's contention that "[t]here has long been a general understanding" of the distinction between

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[35] *See* J.A. 115-16, 120-22, 152-65, 221-27, 241-44, 245, 248-49, 251-54, 256-58, 259-60. Judge Gesell found in *NAACP-LDF I* that: "[L]awsuits by [the NAACP and Puerto Rican Legal Defense Funds] have provided millions of dollars in back pay and benefits, and invaluable other 'services' such as increased training opportunities, additional promotions, improved school programs, and better hospital facilities." 504 F. Supp. at 1368. The court of appeals in this case observed that the respondents "share the traits that have traditionally been considered critical in determining eligibility for the CFC . . . ." Pet. App. 21a. It noted that the respondents' litigation efforts served to enforce laws that "protect and aid the needy, as well as . . . protecting the health of society by promoting a clean environment." *Id.* at 25a n.13.

"traditional charities" and "advocacy groups" (Pet. Br. 31)—based upon the assertion that "[t]he United Way and similar federated charities . . . have consistently limited their membership to traditional health and welfare charities and have excluded other groups, such as advocacy groups like respondents" (Pet. Br. 33)—is inaccurate. Indeed, the United Way testimony relied upon by petitioner establishes the opposite proposition:

> "Historically, the United Way movement has always supported advocacy services by agencies for the purposes of furthering their health and welfare missions. From the beginning, United Ways helped fund settlement houses, family service agencies, public health organizations, and prisoner aid societies which led the struggle for better sanitation, better treatment of homeless children and the aged, and more humane treatment of prisoners.
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> "*A large part of United Ways' own activities that now fall under the heading of planning began as community organization for health and welfare and involved advocacy from the start.*" [36]

Even a cursory review of organizations admitted to the United Way demonstrates that this umbrella organization regularly includes groups that litigate on behalf of selective "causes." For example, the brochure for the 1984 National Capital Area CFC lists among the United Way participants "University Legal Services," which provides "legal services to low-income persons with housing problems, enabling them to maintain control of their housing." (Resp. App. 61a.)

Not even direct participation in the CFC itself has been limited in the past to any sharply defined class of "traditional" charities. Over the years, the government

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[36] 1983 Hearing at 250 (statement of Jack Moskowitz, Senior Vice President, United Way of America) (emphasis added).

voluntarily has included in the Campaign such entities as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee. (J.A. 427-28.) Such organizations perform valuable functions; but it is impossible to discern any principled differences between them and the respondent charities, in terms of health and welfare services, that would justify inclusion of one group and exclusion of the other.[37] The term "traditional" thus seems to have little meaning except to describe the charities of which petitioner approves.

Third, according to petitioner, it is not the fact that legal defense funds engage in litigation on behalf of others, as such, that renders them incompatible with the CFC. To the contrary, petitioner has declared that participation in the Campaign by legal aid societies—which also litigate on behalf of others—is entirely appropriate. (J.A. 20.) Participation by such litigation organizations is acceptable to petitioner because they purportedly select their cases "without a policy or practice of discrimination for or against the kind of cause" involved in the lawsuit. 5 C.F.R. § 950.101(a)(1)(i)(H) (1984). Yet this Court has held that litigation to advance a cause, far from being disreputable, is a constitutionally protected activity. *See NAACP* v. *Button*, 371 U.S. 415, 429-31 (1963).[38]

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[37] The government now dismisses inclusion of such environmental and recreational groups in the CFC either as a mistake (Pet. Br. 49) or as justifiable if only petitioner's lawyers had thought to include supporting material in the record (*id.* at n.40). These explanations miss the point. However substantial the activities of such organizations, their voluntary admission to the CFC belies petitioner's present contention that participation in the Campaign has been, and properly should be, limited to so-called "traditional" charities.

[38] Contrary to the assumption in the regulations, many legal aid societies, operating under severe budgetary constraints, are selective in the categories of cases they prosecute or defend on behalf of

Above all, petitioner Devine's characterization of the basic nature of the CFC is distorted. The Campaign was not designed to serve as a means for the government to direct donations to charities deemed "worthwhile" by government officials; nor was it created to promote what petitioner describes as "consensus" among government employees as to which charities are most deserving. Contrary to petitioner's assertions, the Campaign historically *has* been a "clearinghouse" or "publicity and collection agent." It is the individual contributors, not petitioner, who decide which charities are "worthwhile." [39]

Thus, there is no "incompatibility" between the purposes of the Campaign and participation in it by legal defense funds. The only issue is whether federal employees who believe that legal defense funds will help the needy in an effective manner should be free to designate those funds as their beneficiaries. If, as petitioner Devine asserts, there is "a greater consensus that the goals of [traditional charities] are worthwhile" (Pet. Br. 32), then employees who subscribe to that view may designate their contributions to other, more "traditional" charities of their choice, or they may simply make undesignated contributions, secure in the knowledge that their donations will be distributed only among "traditional" charities. Employees who do not share this purported "consensus" should be allowed to designate par-

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their clients. In any event, petitioner never explains why selectivity in *litigation* on behalf of health and welfare interests is bad, while many other health and welfare groups are admitted to the Campaign even though they are selective in pursuing their charitable purposes (*e.g.*, health research groups concerned only with certain illnesses).

[39] *See 1979 Hearings* at 30-31 (statement of Alan K. Campbell, Director, OPM) ("Our role is a supervisory policy role in relationship to what is essentially a decentralized money-raising effort . . . . [I]t is not for us to look internally as to how they allocate money voluntarily given by federal employees. Remember, we are talking about federal employees' money now, not tax money.").

ticular legal defense funds as their beneficiaries if they choose to do so.[40]

This Court rejected a similar attempt to restrain solicitation by certain charities based upon how they spend their revenue in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). There the Village barred door-to-door charitable solicitation by organizations that did not use at least 75 percent of their receipts for "charitable purposes." The Village reasoned that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.* at 636. But the Court refused to allow the Village to characterize such groups as noncharitable simply because the municipality disapproved of how they spent their receipts. "The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing on the streets and house to house." *Id.* at 637 (footnote omitted). Justice White, speaking for the Court, emphasized that the organizations in question "are considered to be nonprofit, charitable organizations under both federal and state law." *Id.* at 637 n.10. The Court declined the dissent's invitation to articulate "how does one define a 'charitable' organization," *id.* at 644 (dissenting opinion). Likewise, the Court rejected the rationale that the prohibition was justified by "the community's collective desire to bestow

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[40] Petitioner suggests that participation by legal defense funds is undesirable because a particular group's efforts "might well be neutralized by those of another fund that supports an opposing view of where the public interest lies, so that no net 'benefit' would result from either group's activities." Pet. Br. 36 n.26. This newly advanced speculation is unsupported by the record and ignores the finding below that the respondents provide substantial health and welfare benefits to the public. This argument, which conveniently overlooks the social benefits that accrue from resolution of disputes through the judicial process, hardly justifies the respondents' expulsion.

its largess upon organizations that are truly 'charitable,' " *id.* at 645.

Just as in *Schaumburg*, where the Village sought to characterize as not "truly 'charitable' " those "advocacy-oriented" organizations with whose spending patterns it disagreed, the government here has labeled respondents "nontraditional" because of the manner in which they serve the needy. Here, as in *Schaumburg*, the disfavored organizations are deemed charitable for all other purposes by federal and state law. In *Schaumburg*, the Court refused to allow the Village to restrict contributions to "truly 'charitable' " groups, instead "leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Id.* at 638. Here, too, the First Amendment requires that individual federal workers be allowed to decide whether their CFC contributions should go to "traditional" or "nontraditional" charities.[41]

E. Petitioner's Asserted Justifications for Expelling Legal Defense Funds Are Unreasonable

In addition to his preference for "traditional" charities, petitioner Devine asserts that expulsion of legal defense funds from the Campaign is necessary for three reasons: to remove "controversy" from the Campaign; to maintain government "neutrality" among competing advocacy groups; and to prevent "inundation" of the

[41] The specific exclusionary mechanism employed here is reminiscent of the 25-percent limitation struck down in *Schaumburg*. The regulations implementing Executive Order 12,404 exclude any organization that expends more than 15 percent of its budget on litigation on behalf of "the causes or policy goals that it supports." 5 C.F.R. § 950.101(a)(1)(v)(C), .101(a)(2) (1984). Thus, a group that engages in litigation may participate in the CFC if it spends 14.9 percent of its income on such activities, but not if it spends 15.1 percent. Such a quantitative limitation was most recently invalidated by this Court in *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2854 (1984).

Campaign by too many participants. The evidence of record provides utterly no warrant for expelling legal defense funds from the Campaign on these grounds.

1. *Controversy*

The ostensible impetus for adoption of Executive Order 12,404 was the controversy allegedly engendered by legal defense funds' participation in the Campaign. Petitioner Devine's memorandum to the White House proposing the Order emphasized this controversy,[42] as did the OPM press release announcing the Order.[43] In the district court, petitioner defended the Order primarily on the ground that exclusion was necessary to remove controversy from the Campaign. *See* note 18 *supra*. In this Court, petitioner has downplayed, but not abandoned, the controversy justification. (Pet. Br. 36-41.) The controversy rationale is both factually and legally insufficient to justify the expulsion.

a. *Factual Inadequacy*

As a factual matter, petitioner Devine grossly exaggerates the extent and impact of the controversy. The AFL-CIO, for example, directed its constituent organizations *not* to boycott the CFC. It assured its members that "no undesignated funds will go to [the Right to Work Foundation]" and urged workers "not to designate the

[42] *See* J.A. 106 (justifying exclusion "[b]ecause of the problems caused by the participation of aggressive and controversial political and legal advocacy groups"). *Cf.* J.A. 269 ("the immediate genesis of the new executive order was the supposed 'controversial' nature of legal defense fund-type organizations").

[43] *See* J.A. 21 ("Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to the recent past inclusion of advocacy groups in the CFC. . . . Devine added, 'We asked the Federal workers to stay with the campaign and to give us one year to clean it up. They kept their part of the bargain, and now President Reagan has fulfilled our promise.' ").

[Foundation] as the recipient of any of their CFC contributions." (J.A. 91-93.)

More important, the alleged controversy has had no discernible impact upon the success of the Campaign. Contributions have increased substantially every year that legal defense funds have participated, as the following chart demonstrates: [44]

Campaign Year	Total Contributions	Increase Over Previous Year	Designated Funds
1981 (Fall 1980)	$ 87,051,770	5.1%	45.9%
1982 (Fall 1981)	94,659,485	8.7	49.5
1983 (Fall 1982)	101,165,247	6.9	62.7
1984 (Fall 1983)	109,274,248	8.0	66.9

No legal defense funds participated in the 1981 Campaign; several participated in the 1982 Campaign; and all of the respondents (as well as the National Right to Work Foundation) participated in the 1983 and 1984 Campaigns. Petitioner's assertions notwithstanding, participation by legal defense funds has not hurt the CFC at all. The most significant change during these years, as the chart demonstrates, has been a dramatic increase in the ratio of designated to undesignated contributions. Many more federal employees have decided to specify which charities should receive their contributions.

Petitioner asserts that the rate of employee participation in the CFC declined between the 1982 and 1983 Campaigns, and he attributes this to the controversy caused by legal defense funds' participation in the CFC. (Pet. Br. 38.) That assertion is erroneous. Although the

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[44] The data in this chart for the 1981 Campaign are based upon an affidavit submitted by petitioner below, J.A. 430; for the 1982 and 1983 Campaigns, upon CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 55a-57a; and for the 1983 and 1984 Campaigns, upon OPM tabulations for the 1984 (Fall 1983) Campaign, dated October 15, 1984. These tabulations are contained in a printout entitled "Fall 1983 Combined Federal Campaign Results" (Oct. 15, 1984) [hereinafter cited as *"Fall 1983 Results"*]. Counsel for respondents have lodged a copy of this document with the Clerk of the Court.

preliminary data contained in the record indicated a slight decline in participation (from 64.7 percent to 63.2 percent), OPM's final figures demonstrate that employee participation in the 1983 Campaign actually *rose* by three percentage points (to 67.65 percent).[45] Thus, the "controversy" that allegedly infected the 1983 CFC did not diminish the total amount of contributions or the level of participation.

Moreover, despite the assertedly controversial character of legal defense funds, many federal employees have chosen to make contributions to them. The respondents have received substantial sums of money from the Campaign, all in the form of designated contributions. The organizations received about $350,000 from the 1983 Campaign in the National Capital Area alone, and an estimated $2 million nationwide. During the 1982 and 1983 Campaigns, the NAACP Legal Defense and Educational Fund received over $525,000 from thousands of donors in over 130 localities. Even the group at the center of the "controversy"—the Right to Work Foundation—received $30,000 in designated funds in the Washington, D.C. area alone. (J.A. 51-52, 228, 234-35.)[46]

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[45] *See* CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 56a. We understand that, subsequent to that memorandum, OPM revised its method of calculating the participation rate by enlarging the universe of employees deemed eligible to participate. Thus, revised participation rates for the 1983 and later Campaigns cannot be compared to those for earlier Campaigns, as to which no such adjustment was made.

[46] In the 1984 Campaign, the "National Service Agencies" (the administrative grouping that contains the legal defense funds, among other participants) received $8,222,000 in designated contributions—a 17 percent increase over the 1983 Campaign. Eleven percent of all designated funds were donated to National Service Agencies. *See Fall 1983 Results*, Tables 2, 4.

b. *Legal Inadequacy*

As a matter of *law*, petitioner Devine's exclusionary action could not properly be based upon controversiality, even if it were shown to exist. In effect, petitioner has declared that if a vocal group of federal employees or competing charities dislike a particular organization, they can force that organization out of the CFC, thereby preventing other employees from directing their Campaign contributions to it. If the Director of OPM shares this dislike of the organization, or fears any public debate, then the disfavored charity will be branded "controversial." The reason for the protesters' opposition to the targeted organization is irrelevant. Under petitioner's rationale, if a group of employees protested participation by the NAACP Legal Defense and Educational Fund based on their dislike of blacks and other minorities, OPM lawfully could exclude the Fund from the CFC—not because OPM necessarily agreed with the protesters, but merely "to avoid controversy." [47]

This Court consistently has refused to allow the government to silence a controversial speaker in order to avoid offending or antagonizing a hostile audience.[48] The

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[47] This is not an unrealistic hypothetical. One of the letters upon which petitioner relied in expelling legal defense funds warned against admitting "groups that stir up negative feelings because of religious . . . affiliation." J.A. 370-71.

[48] *See, e.g., Bolger* v. *Youngs Drug Prods. Corp.*, 103 S. Ct. 2875, 2883 (1983) (" 'we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression' "); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms"); *Street* v. *New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) (" 'constitutional rights may not be denied simply because of hostility to their assertion or exercise' "); *Terminiello*

Court articulated the rationale for these cases in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). There it invalidated a rule barring students from wearing antiwar armbands in school (plainly a *non*public forum during class hours in at least certain respects). The school officials had sought to justify the ban on the basis of their "urgent wish to avoid the controversy which might result from the expression . . . of opposition to this Nation's part in the conflagration in Vietnam." *Id.* at 510 (footnote omitted). The Court rejected that justification:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."

Id. at 508-09.

More recently, the Court confronted the "controversy" justification in *Consolidated Edison Co. of New York, Inc.* v. *Public Service Commission*, 447 U.S. 530 (1980). There the Court overturned a ban on the insertion of statements on "controversial" subjects in the utility's bills to its customers:

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v. *City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.").

> "[C]ustomers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' . . . The customer . . . may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."

Id. at 542 (citation omitted; footnote omitted). *Accord, Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2883 (1983). Surely, the home of a utility's customers, where the billing inserts are received and the utility's message is heard, is as nonpublic as a place can be. But, petitioner's argument notwithstanding, the nonpublic character of the homes in *Consolidated Edison* did not preclude application of the Court's longstanding protection of First Amendment interests.[49]

Here, as in *Consolidated Edison*, simple remedies are available to any federal employee who may be offended by the participation of legal defense funds in the CFC: he may designate his contribution to go exclusively to groups he likes, as OPM actively encourages him to do (J.A. 84-86); or he may leave his contribution undesignated, without fear that any portion of it will go to the groups he disfavors.

The increase in total donations in the 1983 CFC was accompanied by a 25 percent increase in the proportion of designated contributions. (J.A. 430.) In the OPM press release that accompanied Executive Order 12,404, petitioner Devine recognized the role played by designated contributions in defusing the purported hostility to legal defense funds:

> "Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to

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[49] *See also F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106, 3120 (1984) (invalidating congressional restriction of editorializing by noncommercial broadcasting stations on " 'controversial issues of public policy' ").

> the recent past inclusion of advocacy groups in the CFC. 'Sentiment favoring a wholesale boycott of the CFC was strong this last year,' he said, 'but the forbearance of Federal workers was heartening. *Most workers still contributed to the campaign, but earmarked their donations for specific charities, thereby avoiding the possibility that their gifts would go to unwanted recipients.*' "

(J.A. 21 (emphasis added).)

Final recognition of the legal inadequacy of petitioner's controversy justification comes from his own General Counsel, who acknowledged a few weeks before Executive Order 12,404 was adopted: "An organization which meets the published eligibility criteria cannot, under the First Amendment to the United States Constitution, be excluded from participation in the CFC simply because it is controversial." (J.A. 432.)

2. *Neutrality*

Petitioner Devine next asserts that expulsion of legal defense funds is necessary "to preserve government neutrality among groups with competing public policy views." He contends that admission of a particular organization "is unlikely to be perceived as a neutral act in view of the government's active sponsorship of the Campaign as a whole." (Pet. Br. 43.)

Executive Order 12,404 does not preserve government neutrality: it destroys it. Prior to promulgation of the Executive Order, the government was in fact neutral among "groups with competing public policy views." So long as would-be participants met the content-neutral national eligibility criteria, they could participate in the Campaign. It was the individual contributors, not the government, who chose among the competing charities. In expelling legal defense funds, however, petitioner has declared that "traditional" charities somehow are more "worthwhile" than organizations that serve health and

welfare purposes by resort to the judicial system. (Pet. Br. 32.) He has barred federal employees from designating their CFC contributions to go to legal defense funds, based upon his belief that such organizations are unworthy of support. This official preference for particular types of charities is the antithesis of neutrality.[50]

This Court rejected a much more plausible neutrality claim in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). There one of the justifications for denying student religious groups access to university buildings was that such access supposedly would confer an "imprimatur of state approval on religious sects or practices." *Id.* at 274. The Court rejected that argument: "University students are, of course, young adults. They . . . should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. Presumably federal workers are as able as college students to grasp the principle of official neutrality.[51]

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[50] Petitioner's neutrality justification is especially ironic in light of his persistent opposition to participation in the Campaign by Planned Parenthood:

> "Everyone knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortion; I think that's detestible [*sic*]. I think in a just world you'd have nothing to do with a charitable drive." Pet. App. 30a.

[51] The government itself has recently rejected a similar neutrality argument in Brief of the United States as Amicus Curiae in *Board of Trustees of the Village of Scarsdale* v. *McCreary*, No. 84-277, at 13:

> "To accept petitioners' premise that religious (and other forms of controversial) symbolic speech must be excluded from public parks because of the danger that some observers may infer a government endorsement of the message would convulse modern First Amendment law. It would mean . . . that the only ideas that could be communicated on public land are orthodox ideas: those 'wrapped in the shared and approving sentiments of the community.' "

To preserve both the appearance and the reality of government neutrality, petitioner Devine has at his disposal an option far more reasonable than the wholesale expulsion of legal defense funds: he can include in the CFC brochure as clear and strong a disclaimer of governmental endorsement of participating organizations as he chooses.[52] This Court recently approved such an approach in *F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106 (1984). There the government sought to justify its prohibition of editorializing by noncommercial educational broadcast stations on the ground that it was necessary to "ensur[e] that the audience . . . will not be led to think that the broadcaster's editorials reflect the official view of the government." *Id* at 3125. The Court rejected this justification, observing that Congress could have required a disclaimer stating that the editorial "does not in any way represent the views of the Federal Government." Explained the Court:

> "Such a disclaimer—similar to those often used in commercial and noncommercial programming of a controversial nature—would effectively and directly communicate to the audience that the editorial reflected only the views of the station rather than those of the government."

Id. at 3125-26.[53]

3. *Inundation*

Petitioner Devine also contends that the decision below would lead to inundation of the CFC by so many groups that the Campaign could not continue to function. (Pet.

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[52] The district court found that a disclaimer "would be sufficient to convey the government's desire not to endorse the making of contributions to any particular organization." Pet. App. 94a.

[53] *See also Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981) (rejecting concern over appearance of nonneutrality, because "[t]he University's student handbook already notes that the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members' ").

Br. 16, 48 n.39.) Petitioner's fear of inundation is illusory in two respects.

First, the number of organizations expelled from the Campaign by Executive Order 12,404 is miniscule. According to petitioner Devine's Congressional testimony:

> "I do not suspect that many groups that are presently eligible in the Campaign would not be eligible under our proposal. . . . [T]here will be very little impact in terms of numbers on those eligible. . . . It is going to have an impact [on the number of charities], but in terms, let's say, of 500 current participants in the Washington, D.C. area, we may be talking about ten or something like that; and in terms of percentage in [the Campaign], it would be very small."

1983 Hearing at 176-77.

Second, contrary to petitioner Devine's assertion (*e.g.*, Pet. Br. 48 n.39), the judgments of the courts below do *not* require admission to the Campaign of all charitable organizations that qualify for a tax exemption under Section 501(c)(3) of the Internal Revenue Code. The court of appeals held only that because some legal defense funds do in fact perform health and welfare services, their blanket exclusion from the CFC was improper. (Pet. App. 42a; *see id.* at 98a-99a.) Petitioner Devine remains free to impose reasonable restrictions on participation in the CFC, including, for example, the valid national eligibility criteria that he gratuitously abandoned after the court of appeals decision. *Cf. Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981) (upholding content-neutral restrictions on number of organizations permitted to solicit).[54]

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[54] Even admission of all litigating groups would not inundate the CFC. Although petitioner is correct that the IRS lists some 300,000 Section 501(c)(3) charities, Pet. Br. 48 n.39, its most recent survey of charities (based upon analysis of 1975 returns) reported that there were only 40 groups in the category of "litigation" other than legal aid. By contrast, over 30,000 groups come within the "traditional" health and welfare categories. *See IRS Statistics of Income Bulletin* No. 2, Table 2, at 11-16 (Fall 1981).

F. No Adequate Alternative Means of Solicitation Are Available to the Excluded Organizations

Finally, petitioner Devine argues that the expulsion of legal defense funds from the Campaign should be upheld because "alternative channels of communication are available" to them. (Pet. Br. 44.) He suggests that the respondents could "solici[t] contributions directly from federal workers outside the workplace," for example by "direct mailings" or "fund-raising rallies." (*Id.*) Such proposed alternatives are palpably inadequate substitutes for participation in the Campaign.

As petitioner acknowledges, "[a]ll organizations that wish to receive funds solicited in the federal workplace must do so within the framework of the Campaign." (Pet. Br. 3-4.) All other charitable solicitation in the workplace is barred. Three features of the Campaign render it qualitatively superior to any alternative means of fundraising among federal workers.

First, the solicitation occurs as part of a coordinated, highly publicized, government-wide fundraising drive.[55] Every fall, the local Campaigns focus employee attention on contributing to participating charities. This results in a synergy that would be missing from any individual solicitation.

Second, the CFC is efficient. Because of the consolidated fundraising effort, and the direct focus on an identifiable group (federal workers), the Campaign's administrative costs (which are borne by participating orga-

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[55] *See* 5 C.F.R. § 950.521 (1984) (regulations governing campaign and publicity materials).

nizations[56]) are low—about four percent.[57] The Campaign enables participating organizations to minimize their fundraising expenses and thereby to maximize the use of contributions for their charitable activities.

Third, the CFC allows participating charities to receive their contributions through payroll deductions from contributing employees.[58] Rather than write a single check for a large amount, federal employees may donate by means of periodic deductions of smaller amounts. This is an important element in the CFC's fundraising success.[59]

Petitioner Devine notes that in some cases this Court has pointed to the availability of alternative channels of communication as an element in denying access to a nonpublic forum. (Pet. Br. 45.) But in such cases the alternative channels were reasonable substitutes. In *Perry*, for example, the union that was denied access to the school mailboxes nevertheless had ample alternative means of communicating with teachers—including in-school bulletin boards and meeting facilities. 460 U.S. at 53. Here, by contrast, the proposed alternatives are so different from, and inferior to, participation in the Campaign that they do not constitute reasonable alternatives. In such circumstances, this Court consistently has rejected the "alternative channels" argument.[60]

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[56] *See id.* § 950.519(b) (administrative costs must be deducted prior to distribution of contributions).

[57] In the 1983 (Fall 1982) CFC, total costs for all the local Campaigns were four percent of total receipts. CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 57a.

[58] *See* 5 C.F.R. § 950.523 (1984) (authorizing payroll withholding).

[59] Eighty-nine percent of all receipts in the 1984 CFC were contributed through the payroll deduction process. *See Fall 1983 Results*, Table 3.

[60] *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975) (private theaters would not have been adequate alternative to public theater from which plaintiff was excluded, "since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required"); *Healy* v. *James*, 408 U.S. 169, 183 (1972) (rejecting facilities outside campus as adequate alternative to campus meeting facilities for student groups, in light of "the practical realities").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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